

to the time they were called upon to justify those rates, the Commission held that "o]perators should not be penalized for making good faith attempts to comply with our rules in a timely manner."<sup>60</sup> To avoid penalizing these operators, the Commission established the following policy:

[W]e will require the following actions when different rates are dictated by data used in initial rate-setting than by data current as of the time an FCC Form 393 (and/or FCC Forms 1200/1205) is actually submitted to the franchising authority or the Commission. When current rates are accurately justified by analysis using the old data (and that data was accurate at the time), cable operators will not be required to change their rates. In these circumstances, however, when such operators make any subsequent changes in their rates (such as when seeking their annual inflation increase), those changes must be made from rate levels derived from the updated information. When current rates are not justified by analysis using the old data (so that a rate adjustment would be necessary in any event), cable operators will be required to correct their rates pursuant to current data.<sup>61</sup>

As a result of the Third Reconsideration, Section 76.922 of the rules was amended to state:

§ 76.922 Rates for the basic service tier and cable programming services tiers.

\* \* \* \* \*

(b) \* \* \*

(9) Updating Data Calculations.

(i) For purposes of this section, if:

(A) A cable operator, prior to becoming subject to regulation, revised its rates to comply with the Commission's rules; and

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<sup>60</sup> Third Reconsideration at § 93 (emphasis added).

<sup>61</sup>Id. at § 94 (footnotes omitted) (emphasis in original).

(B) The data on which the cable operator relied was current and accurate at the time of revision, and the rate is accurate and justified by the prior data; and

(C) Through no fault of the cable operator, the rates that resulted from using such data differ from the rates that would result from using data current and accurate at the time the cable operator's system becomes subject to regulation;

then the cable operator is not required to change its rates to reflect the data current at the time it becomes subject to regulation.

The Commission released another Q&A on June 1, 1994, further clarifying this matter. In Question No. 5 of the June 1 Q&A, the Commission acknowledged that the Third Reconsideration "in effect allowed operators to leave in place restructured rates they had set in good faith, even if later changes in inflation data theoretically left those rates too high." The Commission clarified that:

Rates set in accordance with then-current inflation and other data will not be deemed unreasonable solely on account of subsequent changes in that data. If use of current data in a rate justification shows rates are too high, an operator may elect to repeat its calculations using data current as of the date it set the rates. If such recalculations show the rates are permissible, the operator need not reduce its rates solely to account for the current data. However, when it next seeks to change its rates, it must use the general rule to determine the correct "base" rates for purposes of applying the going-forward rules.<sup>62</sup>

TKR already had made the required revisions to its rates, had already notified its customers, and had already completed its Form 393 for filing prior to the time the

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<sup>62</sup>June 1 Q&A, Question No. 5.

Commission announced the 122.5 figure supported by the BPU. At the date TKR set its rates, the 121.8 figure was current. As required by the Third Reconsideration, TKR cannot be penalized for making a good faith attempt to comply with restructuring requirements in a timely manner.<sup>63</sup>

**E. Rate Evasion Determination.**

In making a determination that TKR's A La Carte offerings should be regulated channels, the BPU has essentially determined that TKR has, through its A La Carte offerings, evaded rate regulation. The BPU explicitly held in its orders that the introduction of A La Carte offerings by each TKR system in question "results in avoiding a rate reduction that would otherwise have been required under the FCC rules."<sup>64</sup> Such a pronouncement, however much in error, is clearly a finding that TKR has evaded rate regulation.

Although neither the Commission nor local franchising authorities can regulate A La Carte offerings, the Commission retains ultimate authority under the Act to

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<sup>63</sup>Third Reconsideration at ¶ 93. The Bureau's Order issued August 10, 1994 rejecting the use of a lower inflation factor by Suburban Cablevision is inapposite. In that order, the old inflation factor was used for Line 123 of Form 393, but updated data was used for Lines 122 and 124. The use of the lower inflation adjustment was disapproved because: (i) such "partial refreshment" of data does not appear to be permitted by the regulations; and (ii) no explanation was provided for such inconsistent application. Suburban Cablevision, "Order", Docket No. DA 94-870 (released August 10, 1994). TKR, however, has not engaged in such a "partial refreshment".

<sup>64</sup>See, e.g., the BPU Hamilton order at 6.

determine whether an operator's A La Carte offerings constitute an evasion of regulation. Section 623(h) of the Act requires the Commission, by regulation, to "establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this section" and to "periodically review and revise such standards, guidelines, and procedures."<sup>65</sup> To carry out its directive to prevent evasions, the Commission has the obligation under Section 623(a)(5) of the Communications Act<sup>66</sup> and Section 76.944 of the FCC rules,<sup>67</sup> to overturn orders issued by the BPU or any other local franchising authority which attempt to make such rate evasion determinations in a manner inconsistent with the FCC's rules.

The Act is clear that no provision of local law or BPU regulation that contravenes these sections of the Act may serve as an independent authority for New Jersey to act in contravention of the Act. The Act is unambiguous on this matter of preemption. Section 636(c) of the Act<sup>68</sup> provides that with one unrelated exception, "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise

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<sup>65</sup>47 U.S.C. §543(h).

<sup>66</sup>47 U.S.C. § 543(a)(5).

<sup>67</sup>47 C.F.R. § 76.944.

<sup>68</sup>47 U.S.C. § 556(b).

granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded."

The Commission's pre-emptive authority is recognized as well by New Jersey state law. New Jersey's Cable Television Act reflects clearly a legislative intent to deny the effect of state and local rulings inconsistent with the FCC:

[A]ll the provisions, regulations and requirements imposed by or pursuant to this act shall be operative only to the extent that the same are not in conflict with the laws of the United States or with any rules, regulations or orders adopted, issued or promulgated pursuant thereto by any Federal regulatory body having jurisdiction. No requirement, regulation, term, condition, limitation or provision imposed by or pursuant to this act which is contrary to or inconsistent with any such Federal law, regulation or order now or hereafter adopted shall be enforced by the director or shall be authority for the granting, denial, amendment or limitation of any municipal consent or certificate of approval which may be applied for or issued under the terms of this act.

N.J.S.A. 48: 5A-10g.

Section 601 of the Communications Act, as amended,<sup>69</sup> states that the purpose of Title VI, regarding cable, is to "establish a national policy concerning cable communications," to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems," and to "minimize unnecessary regulation that would impose an undue economic burden on cable systems." The Commission should overturn the OCT's

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<sup>69</sup>47 U.S.C. § 521.

rate orders as contrary to its to-be-established national policy on A La Carte issues. As further envisioned by Section 601 of the Act, the Commission's rejection of the BPU's rate orders will prevent unnecessary regulation by the BPU of A La Carte issues, which regulation is creating unnecessary confusion among TKR's customers and is imposing on TKR an undue economic burden.


### III. CONCLUSION

Wherefore, for the foregoing reasons, TKR respectfully requests that the Commission reverse the BPU rate orders, received by TKR on August 23, 1994 but dated August 17, 1994, which set initial rates for TKR's Elizabeth, Hamilton, Old Bridge, Ramapo, Rockland, Tri-System, Warwick, and Wildwood systems.

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**CERTIFICATE OF SERVICE**

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